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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1008

AMIL A. DINSIO, *Petitioner*

v.

THE STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

AMIL A. DINSIO, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case decided December 23, 1964.

OPINION BELOW

The opinion of the trial court, the Common Pleas Court of Franklin County, Ohio is unreported and is printed in the transcript of the record at page . The opinion of the intermediate appellate Court, the TENTH DISTRICT COURT OF APPEALS OF THE STATE OF OHIO, printed in Appendix A hereto, infra, page 1a, is unreported. The decision, without opinion of the Supreme Court of Ohio, printed in APPENDIX B and APPENDIX C hereto, *infra,* page 9a, and page 10a, are unreported.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. Section 1257, the pertinent portion of which provides:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . The United States.

QUESTIONS PRESENTED

1. Whether it constituted a violation of the Fourth and Fifth Amendments to the Constitution of the United States for police officers to take the clothing from petitioner while he was in their custody during a period of unlawful detention. The purpose of the taking of the clothing of the petitioner was for the sole purpose of running physical and chemical tests on said clothing for the purpose of obtaining evidence against petitioner, and later to admit into

evidence at the trial of accused the evidence which was obtained by the aforesaid illegal method.

2. Whether it constituted a violation of the Fifth and Sixth Amendments to the Constitution of the United States for police officers to arrest without warrant and to interrogate petitioner during an eighty-four hour delay in arraignment, to deny counsel to the petitioner and to testify at the trial of the petitioner as to the statements made by him during said illegal detention.

3. Whether it constituted a violation of the Fourth and Fifth Amendments to the Constitution of the United States to make an arrest without a warrant of petitioner and to detain him for approximately eighty-four hours before formal charges could be filed where there was a lack of probable cause to make such an arrest.

4. Whether it constituted a violation of the Sixth and Eighth Amendments of the Constitution of the United States for a Municipal Court to set bond on petitioner in the amount of two hundred thousand dollars on petitioner while he is awaiting a hearing on a breaking and entering charge and where there was an eighty-four hour interval between petitioner's arrest without a warrant and his arraignment in said Municipal Court.

5. Whether it constituted a violation of the Sixth Amendment to the Constitution of the United States for the State of Ohio to fail to furnish petitioner with a Bill of Particulars until January 16, 1964, the first day of petitioner's trial, when petitioner had by proper motion requested a Bill of Particulars on October 4, 1963.

6. Whether it constituted a violation of the Sixth Amendment to the Constitution of the United States for the petitioner to stand trial on an indictment which failed to allege an offense against the petitioner.

7. Whether it constituted a violation of the Sixth Amendment to the Constitution of the United States for the trial court to permit the State of Ohio to introduce into evidence, over objection, matter which was prejudicial to petitioner and which had no application whatever to petitioner's case.

8. Whether it constituted a violation of the Sixth Amendment to the Constitution of the United States for the trial court to refuse to hear evidence on behalf of petitioner by an expert witness; said exclusion of evidence being substantially prejudicial to petitioner's right to a fair trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or

> public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States, Sec. 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, AMIL A. DINSIO, was arrested without a warrant in Columbus, Ohio by the police officers of that city. The police officers were answering an alarm at the Big Bear Store, 386 West Lane Avenue, right adjacent to the campus of Ohio State University. Petitioner was arrested some distance, possibly a mile or so from this Big Bear Store and some time later. When petitioner was arrested he was lying on the ground, this was on a Friday morning around 4 A.M. September 4, 1963.

Petitioner was taken to jail and was interrogated and searched during this confinement and some eighty-four hours later he was arraigned before a judge of the City of Columbus Municipal Court on the following Monday afternoon, September 9, 1963. Petitioner was arraigned and without entering a plea to the two charges against him in Case No. 27524 and Case No. 27525 a preliminary hearing was had. Petitioner was bound over to the Franklin County Court of Common Pleas and bond was set in the amount of two hundred thousand dollars.

Motions for reduction of bond were held and the excessive bond was later lowered to a figure where petitioner was able to secure his release.

Petitioner was indicted by the September Term of the Franklin County Grand Jury on two counts; one charging burglary of the Big Bear Store in the night season; and the second count, alleging a forcible entry into a depository box containing money.

The Cases came on for trial in the Court of Common Pleas and a trial to the Court was held on January 16, 1964. A finding of guilty was made by the Court on January 18, 1965.

A motion for a New Trial was filed on January 20, 1964 and was overruled on January 21, 1964.

A Notice of Appeal was filed on February 21, 1964. The bill of exceptions (TRANSCRIPT) was filed on February 26, 1964. The Tenth District Court of Appeals affirmed the judgment of the Court of Common Pleas in an opinion rendered on July 21, 1964 and journalized on August 26, 1964.

Petitioner then on September 3, 1964 filed a Notice of Appeal to the Ohio Supreme Court and said case was docketed on October 6, 1964 as Case Number 39129 "State of Ohio v. Amil A. Dinsio".

On Tuesday, December 15, 1964 this case came on for hearing upon motion for leave to appeal. Appeal as of right pending, Oral argument was heard and on December 23, 1964 the Supreme Court of Ohio dismissed petitioner's Motion For Leave to Appeal From the Court of Appeals for Franklin County for the reason that no substantial constitutional question exists herein.

REASONS FOR GRANTING THIS WRIT

POINT 1

It Was a Violation of Petitioner's Rights Under the Fourth and Fifth Amendments to the Constitution of the United States for the Police to Take Petitioner's Clothing From Him While He was Unlawfully Detained.

We will deal later with whether or not there was probable cause for Petitioner's arrest on September 6, 1963. Clearly it was the statutory duty under Ohio R.C. Sec. 2935.05 which states:

> "When a Sheriff, etc. has arrested a person without a warrant, he must, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and

> must make or cause to be made before such court or magistrate a complaint stating the offense for which the person was arrested."

Petitioner was arrested and no complaint against him was made until 3½ days later. During this period of illegal detention his clothes were taken from him for the purpose of examining them for evidentiary matter against petitioner. Said clothes were taken from him before he was permitted counsel.

In this case petitioner was arrested in order that he could be searched and interrogated.

If the purpose is to search then a search warrant is necessary (*U. S.* v. *Harris*, 321 F. 2nd 739). Also the search incidental to an arrest is limited only to products and instrumentalities; never merely to search for evidentiary matter.

Ker v. *California*, 374 U.S. 23 states that federal standards must be respected.

Looking at Ohio R.C. 2933.23

> A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Thus has the Ohio legislature fixed the standards for obtaining a search warrant. For some reason, even though petitioner was in custody and there was ample time from 8:00 A.M. to 4:00 P.M. on September 6, 1963 no one in the Columbus police department sought a warrant to search petitioner.

There was no excuse for not obtaining a search warrant. Obviously, the requirements as respects probable cause, to search without a warrant, that is, an incidental search, can be no less than the requirements to search with a warrant.

Did petitioner's counsel object to the introduction of the evidence obtained as a result of this warrantless search? See Transcript page 128 where the trial judge granted petitioner an objection to every question that is asked all through the trial.

PAGE 128 TRANSCRIPT LINE 15:

The Court: "You may have an objection to every question that is asked all through the trial, if you want.

Mr. Draper: "That would be a good idea.

PAGE 191 TRANSCRIPT LINE 15:

Mr. Draper: "Oh, prior to that we would also like to make a motion to dismiss the first count of the indictment and a seperate motion to dismiss the second count of the indictment.

The Court: "No, That is all you have been doing."

The Court: "Overruled."

This blanket objection coupled with a motion to dismiss the indictments by petitioner is nearly identical with the rule in *Henry* v. *Mississippi*, U.S. , 13

L ed. 2nd 408, in which this court ruled that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest.

POINT 2

It Was a Violation of Petitioner's Rights Under the Fifth and Sixth Amendments to the Constitution of the United States for Police to Arrest Without Warrant and to Interrogate Petitioner During an Eighty-Four Hour Delay in Arraignment, to Deny Counsel to Petitioner and to Interrogate Him and to Make No Effort to Cause Petitioner to be Arraigned on the Charges That He Was Arrested for.

The case of *Escobedo* v. *Illinois*, U.S. , 12 L ed. 2nd, 977, makes it abundantly clear that no pre-trial statements elicited by the police during interrogation may be used against the accused at a criminal trial.

Here, petitioner's Sixth Amendment rights were clearly denied.

The case of *Mallory* v. *United States*, 354 U.S. 449, lays down the federal rule on the length of time that federal arresting officers may take and the ordinary administrative steps required to bring a suspect before the nearest available magistrate. Ohio has a similar arrest and arraignment statute. Via the Fourteenth Amendment to the Constitution of the United States, it would be a violation of due process to deny an accused in Ohio a right which he would be entitled to, and is entitled to under the laws of Ohio. Disrespect for this law by police officers in Ohio is no excuse for a court to deny the protection of that law to its citizens.

POINT 3

It Was a Violation of Petitioner's Rights Under the Fourth and Fifth Amendments to the Constitution of the United States When He Was Arrested Without a Warrant and Without Probable Cause and Was Subsequently Detained for Some Eighty-Four Hours While the Arresting Officers Sought to Obtain Evidence to Justify the Arrest.

In *Henry* v. *United States*, 361 U.S. 98, decided the issue as to whether there was probable cause for an arrest, without warrant, leading to the search that produced the evidence on which the conviction rested.

Petitioner's case is directly in point. See page 306 of the Transcript Line 13 the trial judge states:

> "I might say in the beginning that if there were no evidence here except the evidence of Officer Towers (the arresting officer) as to the identity of the Defendant, I couldn't find that there was proof beyond a reasonable doubt," . . .

Now if the trial judge couldn't accept the police officer's identification, upon which the State of Ohio must rely as to probable cause, then certainly by the rule in the *Henry* case they can not establish probable cause by searching and interrogation of the accused.

The probable cause for an arrest must exist at the time of the arrest.

POINT 4

It Was a Violation of Petitioner's Rights Under the Sixth and Eighth Amendments to the Constitution of the United States for a Municipal Court to Set Bond on Petitioner in the Amount of Two Hundred Thousand Dollars While He Was Awaiting a Hearing on a Breaking and Entering Charge and Where There Had Elapsed a Period of Some Eighty-Four Hours Between Petitioner's Arrest and His Arraignment.

While petitioner had been arrested before and in fact had an appeal pending at this time (September 9, 1963) and was on bond of $10,000 set by the Ohio Supreme Court and where the petitioner was a property owner in Ohio and had never failed to appear at any time before any court, the setting of bond of two hundred thousand dollars seemed to be excessive. Quite naturally this high bond received the attention of the Columbus newspapers and television and radio outlets so that all, or nearly all, prospective jurors learned that petitioner's liberty carried a price tag of two hundred thousand dollars. This sum in cash would have qualified petitioner to apply for two charters to open and operate two banking institutions in the State of Ohio.

It is easy to see why petitioner waived his right to a jury trial under these conditions.

POINT 5

It Was a Violation of Petitioner's Rights Under the Sixth Amendment to the Constitution of the United States for the State of Ohio to Fail to Furnish Petitioner With a Bill of Particulars Until January 16, 1964, the Opening Day of Petitioner's Trial, When Petitioner Had By Proper Motion Requested Said Bill of Particulars on October 4, 1963.

In most jurisdictions the accused may move for a Bill of Particulars where the indictment does not

clearly set forth the charge against the accused. See *Kirby* v. *United States*, 174 U.S. 47 and this court in *Dunlop* v. *United States*, 165 U.S 486 states that an application for a Bill of Particulars should be granted whenever the accused is liable to be surprised by evidence for which he is unprepared.

It must be remembered that the arresting officers arrested petitioner when they claimed that he was in flight. See *United States* v. *Paige*, 324 F. 2nd 31 which states that mere presence at perpetration of crime and criminal flight is circumstance tending to prove only consciousness of guilt.

POINT 6

It Constituted a Violation of the Fifth and Sixth Amendments to the Constitution of the United States for the Petitioner to Stand Trial on an Indictment Which Failed to Allege an Offense Against the Petitioner.

See *Kirby* v. *United States*, 174 U.S. 47; *Dunlop* v. *United States*, 165 U.S. 486.

The Bill of Particulars, when belatedly filed by the State of Ohio, failed to allege an offense by this petitioner. The Trial Court recognized this, as is shown by the following quotations from the Transcript:

TRANSCRIPT, PAGE 7:

The Court: "This Bill of Particulars doesn't advise the Defendant of anything."

TRANSCRIPT, PAGE 8:

The Court: "You have to plead some facts which show what you expect to prove by this. Now, they might have read this in a newspaper, burglary of Big Bear Store. It doesn't connect this man up anymore

than it does you or me. This is not a proper Bill of Particulars.

TRANSCRIPT, PAGE 9:

Mr. Newsom: "I can't see where we have to in any way under the circumstances tell them what our evidence is going to be in this case."

The Court: "No, but you have to give them some facts on which they can predicate a defense. No facts here to show this fellow had anything to do with it or was connected in any way."

Mr. Draper: "In order to preserve the record, Judge, the reason we move to quash the indictment is on the grounds that the Prosecuting Attorney has indicated by his Bill of Particulars that this Defendant was not connected with the offense charged."

The Court: "No, it doesn't show that."

The observation of the trial court completely substantiates the position of this defendant—that the Bill of Particulars, as filed, failed to charge or relate this petitioner to the offense alleged in any manner, and this petitioner respectfully submits that the Motion to Quash, which was made by petitioner's attorney, should have been sustained.

POINT 7

It Was a Violation of the Petitioner's Right to a Fair Trial Under the Sixth Amendment to the Constitution of the United States When the Trial Court, Over Petitioner's Objection Permitted the Introduction Into Evidence of Incriminating and Prejudicial Matter Which Was Never in the Slightest Manner Linked to or Connected With Petitioner.

Transcript Pages 112 and 113 illustrates where Officer Earl Weeks, of the Columbus Police Department, over the objection of petitioner, was permitted to testify at length as to matters which were highly prejudicial to the petitioner. Officer Week's testimony was never linked to anything even remotely connecting it with petitioner's case.

Further the testimony of a Mr. James Dixon was permitted, over petitioner's objection, and was never linked to defendant.

Even the Prosecuting Attorney shared this view inasmuch as he withdrew the trial exhibits and did not offer said exhibits into evidence, saying:

TRANSCRIPT, PAGE 189, LINE 5:

Mr. Allison: "We will withdraw as not connected up, Your Honor, State's Exhibit No. 16, the photograph of an automobile, State's Exhibit No. 17, a photograph of an interior of the automobile showing a police band radio and walkie-talkie and so forth. We will also withdraw State's Exhibit No. 20, a pad of matches, which have not been connected up in any way, and aside from that I believe each and every other exhibit has been connected up and sufficiently identified."

It is a sound rule of public policy and therefore exclusionary in the sense that it keeps out relevant evi-

dence for justifiable reasons. Besides the highly prejudicial character of such evidence there are the considerations that a defendant is entitled to be tried only for the crime charged against him, that he is entitled to notice and the right to prepare his defense to any charges brought against him free from surprise.

POINT 8

It Constituted a Violation of the Petitioner's Right to a Fair Trial Under the Sixth Amendment to the Constitution of the United States for the Trial Court to Refuse to Hear Evidence Offered By Petitioner of an Expert Witness; Said Exclusion of Evidence Being Substantially Prejudicial to Petitioner's Right to a Fair Trial.

The whole basis for probable cause for the arrest of petitioner and a link in the evidence at the trial was the identification of Officer Edward Towers who claimed to have identified petitioner as one of two men seen fleeing from the scene of the burglary. Mr. Towers stated that his identification was from 150 feet away and that he was able to make the identification because of the illumination of a nearby street light.

Petitioner proferred the testifimony of Mr. Ronald Warren, a commercial photographer. See transcript pages 233 through 236, virtually all of the testimony of such expert witness of the scene and area in which the State's witness purportedly identified petitioner was excluded upon objection by the State and the answers proferred by counsel for petitioner.

If we consider the case of *Beck* v. *Ohio*, U.S. , 13 L ed. 2nd., 142 as bearing on whether or not there was probable cause for the original arrest certainly petitioner should have been allowed to produce testimony to show that the identification of petitioner, in all probability, was not possible.

It is doubly interesting to know why petitioner was not permitted to show evidence favorable to himself as to lack of or mistake in identification when one considers that petitioner is a short individual, standing about 5 foot 4 inches in height when Officer Towers originally testified at the preliminary hearing that the petitioner was five feet ten inches. Officer Towers finally arrived at the position that he did not know and could not, in fact explain these discrepancies in height and types of clothing worn by the person he claimed that he identified and the actual height and style of clothing worn by petitioner. It is all the more interesting by the knowledge that petitioner was rendered unconscious within minutes after his arrest.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue.

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APPENDIX A

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7639

STATE OF OHIO, *Plaintiff-Appellee,*

v.

AMIL ALFRED DINSIO, *Defendant-Appellant.*

Opinion

Rendered on July 21, 1964

MR. EARL W. ALLISON, *Prosecuting Attorney,*
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For Defendant-Appellant.

BRYANT, *J.* (Presiding.)

Amil A. Dinsio, defendant below, has appealed on questions of law from the judgment of conviction and sentence under a two-count indictment charging that on September 6, 1963 (first count), Dinsio burglarized a building contrary to Section 2907.10 of the Revised Code, and (second count), forced entrance into a depository box containing money, contrary to the provisions of Section 2907.12 of the Revised Code.

The indictment was filed on September 18, 1963, and served upon Dinsio the same date. He was arraigned on September 27, 1963, and pleaded not guilty, appearing with privately employed counsel, reserving the right to file a motion in seven days.

On October 4, 1963, Dinsio, pursuant to Section 2941.07 of the Revised Code, filed a motion for a bill of particulars as to each count in the indictment "setting forth * * * the facts upon which the offenses * * * in the indictment are founded and * * * the manner in which it is claimed that the defendant is involved in the offenses."

Thereafter, upon application jointly made by the defendant and the prosecution, the case was set over to the January 1964 term. Dinsio waived a jury, and the charges were tried to the court beginning January 16, 1964. At the start of the case, counsel for Dinsio brought to the attention of the court that the prosecution had not responded to the motion for a bill of particulars filed on October 4, 1963.

The trial was recessed while a bill of particulars was prepared and filed. The trial court found the first bill of particulars to be inadequate, and another recess was taken at the end of which a second bill of particulars was filed.

The trial then proceeded with both sides presenting witnesses, and after the submission of all of the evidence, the court acting as jury returned a verdict of guilty. A motion for a new trial was filed and overruled, and Dinsio was sentenced to the Ohio Penitentiary on each count, the sentences to run concurrently.

The first error assigned is as follows:

> "1. The trial court erred in not requiring the State of Ohio to furnish a Bill of Particulars until January 16, 1964, the first day of the trial, although the motion for such Bill of Particulars was filed October 4, 1963."

The right of a defendant in a criminal case to a bill of particulars arises under Section 2941.07 of the Revised Code, formerly Section 13437-6 of the General Code. It was first enacted effective in 1929 as a part of a code of criminal procedure. Prior to 1929, the right of a defendant

in a criminal case to a bill of particulars was not recognized in Ohio. State v. Boyatt (1926), 114 Ohio St., 397, and City of Cincinnati v. Schill (1932), 125 Ohio St., 57.

The brief of appellant cites only the case of State v. Petro (1947), 148 Ohio St., 473, in support of the claim that the requirement is mandatory. There were of course numerous other supreme court cases, some before and others since the Petro case, supra.

The Schill case, supra, declined to give effect to the law as to bills of particulars because this law became effective a few days too late to apply. Another early case was State v. Whitmore (1933), 126 Ohio St., 381, which in paragraph two of the syllabus upheld Section 13437-6 of the General Code as reasonable, and in paragraph nine held that "a high, technical degree of certainty in stating an offense in an indictment never was required in Ohio." This case is cited with approval in State v. Lindway (1936), 131 Ohio St., 166, 183, State v. Hutton (1937), 132 Ohio St., 461, 463, and State v. Hahn (1938), 133 Ohio St., 440. See also State v. Collett (1945), 144 Ohio St., 639, as explained in the Petro case, supra. In the Hahn case, supra, the complaint had been made, but was rejected, that the bill of particulars failed to disclose that the state would prove crimes other than the crime in the indictment, while in the Collett case, supra, there was a failure to furnish a bill of particulars, which the court of appeals held to be error, but a majority did not find it to be prejudicial error. The appeal to the supreme court in the Collett case, supra, was dismissed because no debatable constitutional question was involved.

In the Petro case, supra, paragraphs one through four of the syllabus read as follows:

> "1. On the appeal of a criminal case, a judgment against the accused should be affirmed unless the reviewing court finds that it affirmatively appears from

the record that the accused was prejudiced by error or prevented from having a fair trial.

"2. The proviso contained in Section 13437-6, General Code, 'that the prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged,' is a mandatory provision and the overruling of defendant's motion seasonably made to order the prosecuting attorney to furnish such bill of particulars constitutes error.

"3. Whether the failure of the court to order the prosecuting attorney to furnish a bill of particulars setting up specifically the nature of the offense charged is prejudicial error requiring reversal by a reviewing court, depends upon the facts of the particular case.

"4. A prosecuting attorney is not required to disclose the state's evidence through a bill of particulars, but is required to state specifically the nature of the offense charged, including the manner in which or the means by which the death was caused, where the indictment charges murder in the first degree."

In course of the opinion by Turner, J., in the Petro case, supra, there appears the following at p. 482:

"In the per curiam opinion in the case of State v. DeRighter, 145 Ohio, St., 552, 556, 62 N.E. (2d), 332, it was held:

" 'Hence, it is clear that the purpose of a bill of particulars is not to disclose the state's evidence but simply to state specifically the nature of the offense charged.' "

Where there is vagueness or uncertainty or where the charge is in the alternative, alleging two, three or more offenses, it is error to refuse upon proper demand to fur-

nish a bill of particulars. See State v. Fowler (1963), 174 Ohio St., 362.

It does not appear from the record either that a formal demand ever was made upon the prosecuting attorney, and there likewise is no indication that the motion which was filed by one of the several attorneys who represented Dinsio was served or otherwise brought to the specific attention of counsel for the state.

The fact is that immediately upon this matter being brought to the attention of the trial court, the judge stopped the trial and the prosecutor prepared and filed a bill of particulars. This did not meet the approval of the trial judge who again stopped the trial and required a more detailed bill of particulars to be furnished.

The motion in this case asked for "the facts upon which the offenses * * * in the indictment are founded and * * * the manner in which it is claimed that the defendant is involved in the offenses."

Under Section 2941.07, supra, a bill of particulars, if needed, is for the purpose of "setting up specifically the *nature of the offense charged.*" (Emphasis added.)

As stated in the DeRighter case, supra, the purpose of the bill of particulars "is not to reveal the state's evidence but simply to state specifically the *nature of the offense charged.*" (Emphasis added.)

We have been unable to find from the record any indication that the defendant asked for a continuance, made any objection to proceeding at the time or in fact made any objection to the sufficiency of the second bill of particulars.

Even in the brief in this court, no actual prejudice is claimed. This is understandable for the reason that the theory of the defense was simply an alibi—Dinsio claimed he spent the time, while the burglary and safecracking were in progress and many hours prior thereto, in the

company of a girl friend from Pittsburgh riding around, visiting eating and drinking spots, and one or two trips to an apartment building on North Star Road, Upper Arlington, Ohio.

The evidence as to the visits to the apartment on North Star Road backfired when the state produced evidence to show that the tenant whom the defendant and his girl friend claimed to be visiting had moved away more than three months before the night of the burglary and actually was a complete stranger to Dinsio and his Pittsburgh companion.

Here we have a situation where not one but two bills of particulars were filed. There was of course a period of several weeks during which the motion for a bill of particulars was pending with no hearing or other action by the trial court. Defense counsel must share some of the responsibility for this delay for they could have brought the matter to the attention of the trial court much sooner than they did.

We conclude that in no sense was there a refusal but at the most a delay. If this delay prejudiced the defendant, he could have asked for a continuance, but this was not done. Nowhere in the brief is there any claim of actual prejudice.

This court held in the case of Hebden v. Hebden (1957), 107 Ohio App., 184, syllabus, paragraph 1, that one effect of the amendment to Section 6 of Article IV, Judicial, of the Constiution of Ohio, effective in 1945, was that the jurisdiction of courts of appeals was subject to the determination of the General Assembly of Ohio. Section 2945.83 of the Revised Code provides in part as follows:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

"(A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;

" * * * * *

"(E) Any other cause unless it appears affirmatively from the record that *the accused was prejudiced thereby or was prevented from having a fair trial.*" (Emphasis added.)

See State v. Wells (1938), 134 Ohio St., 404.

We conclude that no prejudice in fact took place or is claimed and hence the first assignment of error must be overruled.

The second assignment of error reads as follows:

"2. The indictment, as particularized by the Bill of Particulars, failed to allege an offense by this defendant."

We believe that the indictment as drawn was sufficient to require the overruling of this claimed error, and it was not made more vulnerable due to the filing of the two bills of particulars. This assignment is not well taken. The comments in Dinsio's brief at page 2, attributed to the court, appear to relate to the first bill of particulars then before the court. The court below did not consider or question the sufficiency of the indictment to withstand a demurrer, which is the test to be applied in considering the second assignment of error, which must be overruled.

The third assignment of error reads as follows:

"3. The court erred in the admission of evidence over the objection of the defendant, contrary to law and to the substantial prejudice of this defendant."

This objection relates to testimony of a Columbus police officer and another witness concerning pictures of the exterior and interior of an automobile near the scene of the burglary, later withdrawn because in the opinion of the prosecuting attorney the evidence was insufficient to link the car to the crimes at the Big Bear Store. If the story of defendant was to be believed, he was nowhere near the scene. We fail to ascertain how Dinsio was prejudiced, and this assignment of error must be overruled.

The fourth and final assignment of error is as follows:

> "4. The trial court erred in the admission of evidence contrary to law, and to the substantial prejudice of this defendent."

The chief basis for objection is the rejection of testimony offered by a defense witness seeking to weaken the effect of testimony by a police officer that, under the light available and at the distance, he was able to recognize a man fleeing from the scene of the burglary. Much leeway must be left to the trial court in situations such as this, the trial court being required not to abuse its discretion in such cases. We do not believe an abuse of discretion has been shown.

For the reasons above set forth, the errors assigned and each of them must be overruled, the judgment of the court below must be affirmed and the cause remanded.

TROOP, *J.*, concurs.

DUFFEY, *J.*, concurs in judgment.

APPENDIX B

SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, } 1964 Term
CITY OF COLUMBUS. } To wit: December 23, 1964

No. 39129

STATE OF OHIO, *Plaintiff-Appellee,*

v.

AMIL A. DINSIO, *Defendant-Appellant.*

Motion for Leave to Appeal from the Court of Appeals for Franklin County

It is ordered by the Court that this motion is overruled. COSTS:

Motion Fee, $20.00, paid by Lawrence V. Cregan

I, Thomas L. Startzman Clerk of the Supreme Court of Ohio, certified that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 23rd day of December 1964
(s) THOMAS L. STARTZMAN, *Clerk*

_____, *Deputy*

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, } 1964 Term
CITY OF COLUMBUS } To wit: December 23, 1964

No. 39129

STATE OF OHIO, *Plaintiff-Appellee,*

v.

AMIL A. DINSIO, *Defendant-Appellant.*

Appeal from the Court of Appeals for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the ——————appellee ——————— recover from the ——————— appellant ——————————— costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the sale of the
Court this 23rd day of Dec. 1964
(s) THOMAS L. STARTZMAN, *Clerk*

————————————, *Deputy*